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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-893

IRVING SULMEYER and ARNOLD L. KUPETZ,
Co-Trustees in Bankruptcy for
Bubble Up Corporation,
Petitioners,

vs.

THE COCA-COLA COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, The Coca-Cola Company, submits this brief in opposition to the Petition of Irving Sulmeyer and Arnold L. Kupetz, Co-Trustees in Bankruptcy for Bubble Up Corporation, for the Writ of Certiorari, and, for the reasons set forth herein, respectfully urges the Court to deny the Petition.

I. QUESTIONS PRESENTED FOR REVIEW

Although Petitioners set forth five issues in their "Questions Presented for Review" (Petition, pp. 2-3),

it is clear from their argument and citation of authority (Petition, pp. 11-13) that the only questions which even they believe merit attention involve the issues of allegedly illegal territorial provisions and an allegedly erroneous treble damage instruction. Moreover, there is a mischaracterization of the issues in Petitioners' questions numbered 1 and 2, which describe the issues in terms of whether "agreements to divide markets", "tying arrangements" and "group boycotts" are "immunized" from antitrust proscription under certain circumstances. There has never been any contention in this case of antitrust immunity, let alone a holding to that effect by either the trial or appellate court.

The "questions" cited by Petitioners are, in large part, nothing more than disputed *factual* issues which were resolved against Petitioners by the jury. To the extent that Petitioners now present *legal* issues, Respondent respectfully submits that those issues can be more accurately described as follows:

(1) Did the Court of Appeals err in refusing to consider Petitioners' contentions regarding territorial provisions, after Petitioners had failed to present those same issues for resolution by either the trial court or jury?

(2) Did the Court of Appeals err in holding that the trial court's treble damage instruction, and defense counsel's reference to trebling in closing argument, constituted harmless error where, as here, the jury never reached the question of damages?

For reasons set forth below, however, Respondent urges the Court to decline to review even these questions.

II. STATEMENT OF THE CASE

A. Nature of the Case.

On or about January 2, 1968, Petitioners' bankrupt filed suit against Respondent, alleging violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and seeking to recover damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. After more than four years of discovery, the case was tried before a jury. During the trial, which lasted almost eight weeks, substantial evidence, consisting of over 7,000 pages of transcript and thousands of pages of documentary evidence, was presented.

Contrary to the impression Petitioners now attempt to create, every significant factual issue was hotly disputed at the trial. Petitioners introduced considerable evidence, mostly circumstantial, in support of their numerous, complex claims. At every turn, Respondent introduced positive, direct evidence to contradict that presented by Petitioners, with the result that the disputed questions of fact had to be resolved by the jury.

At the close of their case, Petitioners moved for directed verdict, claiming that the evidence established a group boycott, violative of § 1 of the Sherman Act, and an attempt to monopolize, violative of § 2. This motion was renewed at the close of all the evidence. Since the facts were disputed, both motions were denied, and all issues were submitted to the jury under comprehensive instructions of the trial court. Petitioners objected to only one instruction, that being the one which informed the jury that the matter of trebling damages was a function of the court and not of the jury. After several days of deliberation, the jury returned its verdict that The Coca-Cola Company had not violated the antitrust laws.

The trial proceedings were best described by the Fifth Circuit Court of Appeals when it observed:

> This was a hotly contested eight week jury trial. Both parties presented their positions forcefully and thoroughly in the court below. The jury heard the evidence, and rendered its verdict after receiving comprehensive instructions from the trial judge. We have carefully considered Bubble Up's claims of error, but reject all of them. The jury's verdict must stand. 515 F.2d 835, 852.

B. Statement of Material Facts.

Petitioners devote a substantial portion of their petition to what they contend to be the material facts of this case. (Petition, pp. 4-10.) It cannot be sufficiently emphasized, however, that Petitioners' statement of fact is nothing more than their own argumentative view of the evidence; in some instances the factual assertions are unsupported by any competent evidence, while in others, the assertions are, at best, one of many possible inferences which could be drawn from conflicting evidence.

We respectfully call the Court's attention to the factual analysis contained in the opinion of the Fifth Circuit Court of Appeals, which, we believe, more fully and accurately describes the relevant facts and, especially, the various advertising programs employed by The Coca-Cola Company. *See* 515 F.2d 835, 839-841, 842-845, 847-850.

III. ARGUMENT OF RESPONDENT IN OPPOSITION TO CERTIORARI

In the argument portion of the petition, Petitioners address only two issues: (1) territorial provisions, and

(2) the trebling instruction. Respondent respectfully submits that neither issue presents any question deserving of the Court's consideration.

A. The Territorial Provisions.

Petitioners first contend that the opinion of the Fifth Circuit Court of Appeals is in conflict with decisions of this Court and of other circuit courts with regard to the territorial provisions. They cite several cases which they contend hold both horizontal and vertical territorial restrictions to be *per se* unreasonable restraints of trade. In this case, the Fifth Circuit Court of Appeals observed:

> As our Circuit noted in *Cooper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), "[n]otwithstanding, *Standard Oil Co.* v. *United States, Topco,* and *Schwinn* read together, suggest that at this point we must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions. . . . 515 F.2d 835, 846 (citations omitted).

Whether or not the above-quoted statement is correct, it is clear that the Fifth Circuit Court of Appeals did not decide the territorial issue "in direct conflict with the decisions of this Court" or of other circuit courts of appeals, as contended by Petitioners. (*See* Petition, p. 11.)

In fact, the court of appeals never reached the merits of Petitioners' contentions concerning territorial provisions, because Petitioners had failed to raise them in a timely and proper manner in the trial court. Petitioners did not raise their contentions regarding the territorial provisions in their motions for directed verdict, but, instead, first significantly addressed the is-

sue in their brief supporting their post-trial motion for judgment notwithstanding the verdict. They did not even request a jury instruction on the issue or object to the trial court's failure to give one. Accordingly, Petitioners failed to present their contentions with respect to the territorial provisions to either the trial court or jury, and the court of appeals properly refused to consider their merits for the first time on appeal. Moreover, since the evidence presented at trial did not thoroughly explore the nature, purpose or effect of the territorial provisions, the present record is insufficient to permit a meaningful analysis of this issue.

B. The Trebling Instruction.

Petitioners also seek review of the appellate court's holding that the judge's jury instruction that the trebling of damages was a function of the court and not of the jury was error, but harmless error in the context of this case. The "conflict" cited by Petitioners addresses only the question of whether the instruction was erroneous. On this point, Petitioners prevailed in the court of appeals: "The trial judge's actions constituted error. . . ." 515 F.2d 835, 852. The court went on to hold, however, that, since the jury never reached the question of damages, the error was harmless. On this point, there is no conflict. Other circuit court decisions on this point are in complete accord. *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972); *see also Standard Industries, Inc.* v. *Mobil Oil Corporation*, 475 F.2d 220 (10th Cir. 1973), *cert. denied*, 414 U.S. 829 (1973).

Petitioners' contention that the appellate court's disposition of the trebling instruction conflicts with that court's own earlier decisions is equally erroneous. In *Pollack & Riley, Inc.* v. *Pearl Brewing Company*, 498 F.2d 1240 (5th Cir. 1974), *cert. denied sub nom. Wood* v. *Gulf Oil Corporation*, 420 U.S. 992 (1975), cited by Petitioners, the question was raised in the trial courts by motions in limine, and interlocutory appeals were taken prior to trial. Accordingly, the court never decided the question of actual prejudice, since the charge was never given, and any reference to potential prejudice was clearly *dictum*.

Petitioners also complain of defense counsel's references, during closing argument, to the trebling provision. In doing so, they lift isolated segments from the complex transcript of the lengthy proceedings. The court of appeals, however, had that entire record before it when it concluded:

> The jury specifically found no violations of Sections 1 and 2. As we have previously indicated, ample record evidence supports that determination. Since the jury found no liability, we do not regard the error in the damage instruction as sufficient basis for a new trial. We reach the same conclusion with regard to the complaint about defense counsel's jury argument relating to the trebling provision. 515 F.2d 835, 852.

The jury, having decided that Respondent had not violated the antitrust laws, as reflected in its responses to the trial court's special interrogatories, never addressed the question of damages and, accordingly, could not have been prejudicially affected by either the instruction, the argument, or both taken together.

IV. CONCLUSION

For these reasons, Respondent, The Coca-Cola Company, respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have made due and legal service of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari in compliance with Rule 33(1), Rules of the Supreme Court of the United States, by mailing three printed copies thereof to Petitioners' counsel of record,

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by causing said copies to be deposited in the United States mail, properly addressed, with sufficient air mail postage affixed thereto.

This 21st day of January, 1976.

CHARLES L. GOWEN
Attorney for Respondent and a Member of the Bar of This Court